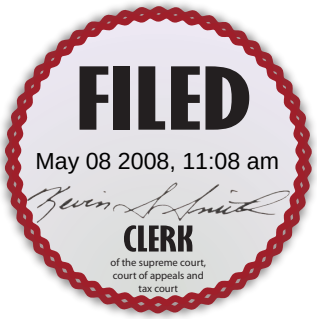

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IN THE
COURT OF APPEALS OF INDIANA

RALPH E. LUSTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0711-CR-962
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark Spitzer, Judge
Cause No. 27C01-0702-FA-53

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Ralph E. Luster appeals his convictions for one count of class A felony conspiracy to commit dealing in cocaine and two counts of class A felony dealing in cocaine. We affirm.

Issues

We restate the issues as follows:

I. Whether Luster received ineffective assistance of trial counsel; and

II. Whether sufficient evidence supports his conspiracy conviction.

Facts and Procedural History

The relevant facts most favorable to the jury's verdict indicate that on October 10, October 11, and November 16, 2006, a confidential informant made controlled purchases of crack cocaine in Raymond Smith's apartment in Greentree West Apartments, a ninety-unit government-subsidized housing complex in Marion. Police recorded the first two transactions via a concealed microphone and the third via a concealed videocamera.

When the informant arrived at the apartment on October 10, Smith opened the door. The informant asked about the cocaine, and Luster responded from the back of the apartment. The informant gave $50 in buy money to Smith, who went to the back of the apartment and returned with crack cocaine. The informant remarked that the amount of cocaine appeared "kinda skimpy[,]" and Luster gave him more cocaine. Tr. at 161.

When the informant arrived at the apartment on October 11, Smith opened the door and was smoking crack cocaine. The informant asked about purchasing more cocaine and went into the bathroom, where Luster was cutting cocaine with a razor blade. The informant gave Luster $50 in buy money, and Luster gave him crack cocaine.

On November 16, the informant telephoned Luster to arrange a buy. Luster told the informant to meet him at Smith's apartment. When the informant arrived, both Smith and Luster were inside. The informant asked for more cocaine and placed the $50 in buy money on a table. Luster placed crack cocaine on the table. The informant broke off a piece of the cocaine and gave it to Smith, who smoked it. Before the informant left with the rest of the cocaine, Luster told the informant to call him if he wanted to purchase more cocaine.

The State charged Luster with one count of class A conspiracy to commit dealing in cocaine and two counts of class A felony dealing in cocaine. On August 14, 2007, a jury found Luster guilty as charged.

Discussion and Decision

I. Ineffective Assistance of Counsel

Luster claims that his trial counsel rendered ineffective assistance in failing to object to the admission of the cocaine he sold to the informant on November 16 and in eliciting incriminating testimony from a witness on cross examination.[1] Our standard of review is well settled:

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *accord Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). First, the defendant must show that counsel's performance was

[1] We have stated that

> a post-conviction hearing is normally the preferred forum to adjudicate a claim of ineffective assistance of counsel. This is so because presenting such a claim often requires the development of new facts not present in the trial record. Although a defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, if he does so the issue will be foreclosed from collateral review.

DeWhitt v. State, 829 N.E.2d 1055, 1065 n.7 (Ind. Ct. App. 2005) (citations omitted).

> deficient. *Strickland*, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, *id*. at 688, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment, *id*. at 687. Second, the defendant must show that the deficient performance prejudiced the defense. *Id*. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.
>
> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Id*. at 689. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 690. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id*. at 689. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the *Strickland* test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (quotation marks, alterations, and some citations omitted), *cert. denied* (2002).

A. Failure to Object to Cocaine

At trial, the State questioned Indiana State Police chemical analyst Troy Ballard regarding State's Exhibit 16, the substance that Luster sold to the informant on November 16. Ballard explained that the substance had been tested twice, once by chemical analyst Christy Long, who was on maternity leave during trial, and once by Ballard himself. Both tests were positive for cocaine. The State asked Ballard about Long's test report, to which he responded,

> [That] is a copy of a certificate of analysis that Christy Long generated as to analysis on State's Exhibit Number 16. I might add that there's some

> additional information on Christy's report that's not part of her original report. There is a handwritten name across the report that's not part of Christy's original report and a couple of four digit numbers or locations at the bottom that were not part of her report, but this report does reflect the results that Christy generated as a result of this particular item.

Tr. at 138. The State offered State's Exhibit Number 16 into evidence, and Luster's counsel did not object to its admission.

On appeal, Luster claims that the State failed to establish a proper chain of custody for the exhibit and that his counsel was ineffective in failing to object on that ground. "When an ineffective assistance of counsel claim is based on a failure to object to the admission of evidence, the defendant must first demonstrate that the objection would have been sustained had defense counsel objected at trial." *Culver v. State*, 727 N.E.2d 1062, 1066 (Ind. 2000).

Our supreme court has stated,

> To establish a proper chain of custody, the State must give reasonable assurances that the evidence remained in an undisturbed condition. However, the State need not establish a perfect chain of custody, and once the State "strongly suggests" the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. Moreover, there is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties. To mount a successful challenge to the chain of custody, one must present evidence that does more than raise a mere possibility that the evidence may have been tampered with.

Troxell v. State, 778 N.E.2d 811, 814 (Ind. 2002) (citations omitted).

Luster claims that the extraneous writing on Long's report establishes "more that [sic] a mere possibility that someone else had handled the evidence. Clearly, the evidence indicates that another party has tampered with the evidence." Appellant's Br. at 5. We disagree. The extraneous writing indicates only that someone else handled Long's report, not

the evidence itself, and it raises nothing more than a mere possibility that the evidence may have been tampered with. As such, any objection to State's Exhibit 16 on chain-of-custody grounds would not have been sustained. Therefore, we conclude that Luster has failed to establish that his counsel was ineffective in failing to make such an objection.

B. Elicitation of Incriminating Testimony

Luster's crimes were elevated to class A felonies on the basis that he committed them in, on, or within one thousand feet of a "family housing complex," which Indiana Code Section 35-41-1-10.5 defines in pertinent part as a building or series of buildings (1) that contains at least twelve dwelling units where children are domiciled or likely to be domiciled and that are owned by a governmental unit or political subdivision, (2) that is operated as an apartment complex,[2] or (3) that contains subsidized housing.

At trial, Luster's counsel cross examined Greentree West Apartments employee Stephen Gause as follows:

> Q [The prosecutor] asked you whether Greentree Apartments meets this statutory definition of a housing project and you indicated that it did, do you recall that?
>
> A Yes, sir.
>
> Q What statute is he talking about?
>
> A I am not exactly sure of what it is, but I've got our, uh, HUD verification number that we are public housing.

[2] "Apartment complex" means "real property consisting of at least five (5) units that are regularly used to rent or otherwise furnish residential accommodations for periods of thirty (30) days or more." Ind. Code § 6-1.1-20.6-1.

Q Okay. And what is [sic] the criteria for determining whether or not it is a housing project for purposes of elevating the dealing statute from a Class B to a Class A felony, do you know?

A It is we have, it is where there are children and families present that are from, we have everything that ranges from newborns to senior citizens, uh, and everybody in between.

Q Okay.

Tr. at 223.

On appeal, Luster contends that his "[c]ounsel's questions brought in crucial evidence of what constitutes a family dwelling [sic]. Without the additional evidence, the State would have failed to prove that the crime [sic] occurred within one thousand (1,000) feet of a family dwelling [sic]." Appellant's Br. at 7. We presume that the "additional evidence" to which Luster refers is Gause's testimony regarding either Greentree's public housing status or the children residing on the premises. We note that Gause testified on direct examination that Greentree contains subsidized housing. Tr. at 217. This testimony alone was sufficient to establish that Greentree is a "family housing complex" as defined by Indiana Code Section 35-41-1-10.5. Because Gause's testimony on cross was merely cumulative of his testimony on direct, Luster cannot establish that he was prejudiced by his counsel's actions. *See Meagher v. State*, 726 N.E.2d 260, 264 (Ind. 2000) ("The complained of evidence was at most cumulative and therefore insufficient to establish prejudice.").

II. Sufficiency of Evidence/Conspiracy

Finally, Luster claims that the State failed to present sufficient evidence to support his conviction for class A felony conspiracy to commit dealing in cocaine. We employ the following standard of review:

> In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or judge the credibility of witnesses. We consider only the evidence most favorable to the [verdict] and any reasonable inferences that can be drawn therefrom. We will affirm a conviction where there is substantial evidence of probative value to support the [verdict]. If a conviction is based on circumstantial evidence, we will not disturb the verdict if the fact finder could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt.

Campbell v. State, 841 N.E.2d 624, 630 (Ind. Ct. App. 2006) (citations omitted).

Indiana Code Section 35-41-5-2(a) provides in pertinent part that "[a] person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same class as the underlying felony." "The [State] must allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement." Ind. Code § 35-41-5-2(b). "In proving the existence of an agreement element, the State is not required to show an express formal agreement, and proof of the conspiracy may rest entirely on circumstantial evidence. However, relationship and association with the alleged co-conspirator, standing alone, is insufficient to establish a conspiracy." *Stokes v. State*, 801 N.E.2d 1263, 1273 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*.

Here, the State alleged that on October 10, 2006,

> Ralph E. Luster with the intent to commit the felony of Dealing Cocaine within a Housing Complex did agree with Raymond A. Smith to commit said felony and in furtherance of said agreement, Ralph E. Luster and/or Raymond A. Smith committed one or more of the following overt acts:
>
> 1. Provided a residence in which to deal cocaine.
> 2. Provided cocaine to be sold to a confidential informant.

Appellant's App. at 9.

Luster claims that only one witness provided evidence regarding the existence of an agreement between him and Smith and that this evidence is insufficient to support his conviction. We disagree. "An agreement can be inferred from circumstantial evidence, which may include the overt acts of the parties in furtherance of the criminal act." *Dickenson v. State*, 835 N.E.2d 542, 552 (Ind. Ct. App. 2005), *trans. denied*. Luster himself testified that he did not reside with Smith. The confidential informant testified that when he arrived at Smith's apartment and inquired about cocaine, Luster responded from the back of the apartment. The informant gave the buy money to Smith, who went to the back of the apartment and returned with crack cocaine. The informant complained about the amount of the cocaine, and Luster gave him additional cocaine. This evidence is more than sufficient to establish beyond a reasonable doubt that an agreement existed between Luster and Smith to commit class A felony dealing in cocaine. Therefore, we affirm.

Affirmed.

BARNES, J., and BRADFORD, J., concur.